Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. 78-1024

JEANETTE P. STRONGIN,

Appellant,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

Appeal from the Court of Appeals of the State of New York

STATEMENT AS TO JURISDICTION

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EWALD B. NYQUIST, Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Court of Appeals of the State of New York entered on June 15, 1978, and the order of that Court denying a motion for reargument entered on September 14, 1978, by which judgment and refusal to rehear, the Court of Appeals of the State of New

York confirmed the actions of the Board of Education of the School District of the City of Mount Vernon which had dismissed the appellant as a public school teacher, the aforesaid action taken notwithstanding the fact that a panel appointed pursuant to New York State Education Law, Section 3020-a had found appellant "Not Guilty" of all charges brought against her, and notwithstanding the fact that the Appellate Division of the Supreme Court of the State of New York had reversed the actions of the Commissioner of Education. Appellant sets forth the following statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a sub-

stantial question is presented.

OPINIONS BELOW

The decision of the panel appointed pursuant to Education Law Section 3020-a finding appellant "Not Guilty" is set out in Appendix A.

The determination of the Board of Education discharging appellant is set out in Appendix B.

The decision of the Commissioner of Education confirming the actions of the Board of Education is set out in Appendix C.

The decision of the Appellate Division of the Supreme Court reversing the decision of the Commissioner of Education and the Board of Education is set out in Appendix D.

The decision of the Court of Appeals of the State of New York reversing the Appellate Division and reinstating appellant's discharge is set out at Appendix E.

The decision of the Court of Appeals of the State of New York denying appellant's motion for reargument is set out at Appendix F.

JURISDICTION

This case began when appellee Board of Education brought charges against the appellant, charging the appellant with incompetency in her position as a tenured guidance counselor in appellee board's district. The said charges were brought pursuant to New York State Education Law Section 3020-a. Appellant

demanded a hearing, and in accordance with the provisions of New York State Education Law Section 3020-a, a panel was convened consisting of a representative selected by appellant, a representative selected by appellee Board of Education, and a third person selected by the first two. In addition, a hearing officer was selected by appellee Commissioner of Education. Following the hearing, the panel unanimously found appellant "Not Guilty" of each and every one of the specifications. The Board of Education, relying on the decision in *LeTarte v. Board of Education*, 65 Misc. 2d 147, rejected the panel's findings and found appellant guilty and termi-

nated appellant's services. Appellant appealed the actions of the Board of Education by a direct appeal to the New York State Commissioner of Education pursuant to the provisions of New York State Education Law Section 310. The Commissioner sustained the findings of the Board of Education. Appellant then commenced a proceeding pursuant to New York State Civil Practice Law & Rules, Article 78, which resulted in a finding by the New York State Supreme Court affirming the determination of the Commissioner of Education. On appeal, the Appellate Division of the Supreme Court of the State of New York reversed both the lower court and the Commissioner

of Education to the extent of finding appellant guilty of only two of the specifications and imposing a penalty consisting of a six month suspension without pay (*Strongin v. Nyquist*,54 A.D. 2d 1031). On appeal by appellees Board of Education and Commissioner of Education, the New York State Court of Appeals reversed the Appellate Division (44 N.Y. 2d 943) and sustained both the lower court and the Commissioner of Education in their confirmation of the actions of the Board.

The jurisdiction of the Supreme Court to review this decision is conferred by Title 28 United States Code, Section 1251(2). The following decisions sustain the jurisdiction of

the Supreme Court to review the judgment on appeal in this case:

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282 (1921);

Nashville C. & St. L. Ry. v. Walters, 294 U.S. 405 (1935).

STATUTES INVOLVED

New York State Education Law Section 3020-a insofar as applicable to this matter, provides as follows:

> §3020-a. *Hearing procedures and penalties.*
> 1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve.***

***

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof.***

***

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence.

***

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within thirty days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position for full pay for any period of suspension and the charges expunged from his record.

***

QUESTIONS PRESENTED

1. Can a tenured teacher be discharged following a hearing held pursuant to a statute that was held to be unconstitutional?

2. Was appellant's due process violated by virtue of the fact that appellee Board failed to give reasons for its actions?

3. Was appellant's due process violated by virtue of the fact that appellee Board had a substantial pecuniary interest in the outcome of the hearing?

4. Was appellant's due process violated by virtue of the fact that appellee Commissioner of Education failed to require the Board to give reasons thereby violating his own rules?

STATEMENT OF THE CASE

In 1970 the New York State Legislature voted to amend the Education Law by the enactment of Section 3020-a thereof (L. 1970, Ch. 717, eff. July 1, 1970). This new section provided for the type of hearing to be held when tenured teachers were brought up on charges by administrators of the school district in which they were employed. Under the law, a hearing was to be held before a panel of three persons, one of whom was selected by the Board of Education, one of whom was selected by the accused teacher, and the third selected either by the first two, or by the Commissioner of Education. In addition, a hearing

officer was appointed by the State Commissioner.

The law also provided that after the panel reached its decision and made its recommendations, the Board of Education has the right to either accept, reject or modify such recommendation (*LeTarte v. Board of Education*, 65 Misc. 2d 147, 316 N.Y.S. 2d 781 [Sup. Ct., Hamilton Co. 1970]).

In November 1972, appellee Pratella preferred charges against appellant, charging her with various acts of misconduct and incompetency. A hearing was held before a panel convened pursuant to Section 3020-a and following the said hearing, the panel rendered a decision, finding appellant not

guilty of each and every specification contained in the charges (Appendix A).

Appellee board of education rejected the determination of the panel and voted and found appellant guilty of the specifications and terminated appellant's services (Appendix B).

Appellee board of education set forth no reasons for its actions.

Appellant then commenced an appeal to the New York State Commissioner of Education, who rendered its decision sustaining the findings of the board of education (Appendix C).

During the pendency of the appeal to the Commissioner of Education, appellee board again failed to set forth any reasons for its action notwith-

standing the specific requirements of the rules and regulations of the Commissioner of Education (8 NYCRR 275.12).

Appellant then appealed the Commissioner's decision to the court and the Appellate Division of the New York State Supreme Court reversed both the Commissioner of Education and the Board of Education, and proposed a penalty against the appellant of six months suspension without pay (Appendix D).

On appeal, the New York Court of Appeals reversed the Appellate Division and reinstituted the determination of the Board of Education, terminating appellant's services (Appendix E).

Motion for re-argument was denied by the Court of Appeals on September 14, 1978 (Appendix F).

In the interim, a challenge to the constitutionality of Education Law Section 3020-a was raised and sustained by United States District Court for the Western District (*Kinsella v. Board of Education,* 378 F. Supp. 54, affd. 542 F 2d 1165 [2d Circ. 1976]).

The District Court held that the law as enacted was defective in that it did not specifically provide for the board of education to either read the record of the hearing, or based its decision on the record, or to give reasons for its decision.

Some nine days after the decision by the District Court in the *Kinsella* case, the New York State Board of Regents amended the rules and regulations of the Commissioner of Education to provide for such a review (*Hodak* [illegible] *v. Central School Dist. No. 1*, 78 Misc. 2d 91, affd. 48 A.D. 2d 302 [3rd Dept. 1975]).

The result is that appellant's rights of due process had been violated by the fact that the hearing was unconstitutional.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Due process is a right guaranteed to tenured teachers by the Fourteenth Amendment and by numerous decisions of this Court. As the late Mr. Justice Frankfurter so eloquently stated

in *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1950), 173-174:

> "Due process is not confined in its scope to the particular form in which rights have heretofore been found to have been curtailed for want of procedural fairness. Due process is perhaps the most majestic concept in our whole constitutional system. While it contains the garnered wisdom of the past in assuring fundamental justice it is also a living principle not confined to past instances."

New York Education Law Section 3020-a was enacted in 1970 (L. 1970, Ch. 717) for the purpose of providing tenured teachers with a greater degree of due process. While the new law provided for greater protection for the tenured teacher in the manner in which the hearing was conducted, the

law provided that the decision of the panel was advisory only and that the board of education could accept or reject the panel's finding (*LeTarte v. Board of Education,* 65 Misc. 2d 147, 316 N.Y.S. 2d 781, Sup. Ct. Hamilton Co., 1970). It was this factor that led to the finding by the District Court in *Kinsella v. Board of Education,* 378 F. Supp. 54, affd. 542 F. 2d 1165 (2d Circ. 1976), that Section 3020-a was unconstitutional on the grounds that there were no set procedures for review of the record by the board of education, coupled with the fact that the board was not required to give reasons for its decision. This thinking was set forth

by the court in the following language (378 F. Supp. at 60):

> "Not only does the procedure outlined above fail to insure that the school board's decision will be based on evidence elicited at the hearing, it provides no safeguards against the school board basing that decision on ex parte evidence. Furthermore, the problem is exacerbated by the fact that the school board is not required to render a written decision setting forth its reasoning and the factual basis for its decision." (emphasis added)

The decision of the District Court was based in part upon the decision of the United States Supreme Court in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 (1969), in which the court stated (90 S. Ct. at 1022):

> "The decision maker's conclusion...must rest solely on the legal rules and evidence adduced at the hearing. (citations omit-

> ted). To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on***"

It was not until February 28, 1974, nine days after the *Kinsella* decision, that the New York State Board of Regents amended the Commissioner of Education regulations (8 NYCRR 82.2-82.10) so as to cure the defect in the statute (*Hodgkins v. Central School District No. 1*, 78 Misc. 2d 91, affd. 48 A.D. 2d 302 [3rd Dept. 1975]). Section 82.11 of the new regulations provides:

> "The decision of the board of education shall be based solely upon the record in the proceedings before the hearing panel, and shall set forth the reasons and the factual basis for the determination."

The charges against the appellant were filed in 1972 and the decision of the board was rendered in 1973. Both actions occurred during a period of time in which the statute under which appellant was discharged was unconstitutional as depriving her of her rights of due process.

The denial to appellant of her rights of due process was compounded by the failure of the Board to give reasons for its actions.

A reading of the decision of the board of education (Appendix B) shows that the board did not set forth any reasons for its determination nor the factual basis for its determination.

The fact that appellant had the right to seek either a judicial review under CPLR Article 78 or a quasi-judicial review under Education Law Section 310 does not cure the constitutional defect. This point, too, was rejected by the court in *Kinsella* in the following language (378 F. Supp. at 60):

> "This court finds that an appeal under Article 78 of the New York CPLR cannot correct the constitutional defects of Section 3020-a. Since the school board is not required to set forth reasons in support of its decision, a review of the factual determination relied upon by the board becomes illusory. Simply stated, there will not be an adequate record for a state court to review. See *United States v. Merz*, 376 U.S. 192, 84 S. Ct. 639, 11 L. Ed. 2nd 629 (1964)".

Similar requirements are mandated by New York Courts. In *Fogel v. Board of Education*, 48 A.D. 2d 925 (2d Dept. 1975), the court held that the teacher had the right to see the trial examiner's report before the board of education acted on the findings (See also *Sorrentino v. State Liquor Authority*, 10 N.Y. 2d 143 [1961]).

Not only was there a very serious violation of procedural due process, but appellant's rights were further violated by the fact that appellee board was not impartial. An impartial decision maker is a basic constituent of minimum due process and any other procedural guarantees are largely without meaning if the deciding tribunal has in some way adversely pre-

judged the merits of the case (*Simard v. Board of Education*, 473 F.2d 988, 993 [2d Cir. 1973]).

This Court in *Tumey v. Ohio*, 273 U.S. 510 (1927), and again in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), held that where the final decision maker had a pecuniary interest in the outcome of a case, participation by that body will deny the accused of due process.

In both judicial decisions in this matter there is reference, directly and indirectly, to the fact that appellant was illegally suspended without pay.

The Appellate Division changed the findings of the board from discharge

to a six month suspension without pay, while the Court of Appeals, in its decision, while reinstating the discharge, gave her the right to seek to recover the amount of money due for the period that she had been illegally suspended without pay. Both rulings are based upon the decisions in *Meliti v. Nyquist,* 41 N.Y. 2d 183 (1976) and *Jerry v. Board of Education,* 35 N.Y. 2d 534, 364 N.Y.S. 2d 440 (1974). Both cases held that such suspensions were illegal and directed that the teacher be compensated for the period of illegal suspension.

Appellee board had illegally suspended appellant on November 3, 1972, some six months prior to the actual

discharge of petitioner. As a result, it had a very clear and substantial pecuniary interest in the ultimate outcome of the case. Had the board adopted the findings of the panel, it would have had to pay appellant her salary for the period during which she was illegally suspended. In addition the board would have had to explain to the people of Mount Vernon why it had expended so much money in prosecuting an innocent teacher (*Boyce v. Alexis I. du Pont School District*, 341 F. Supp. 672, 678 [D. Del. 1972]).

A further violation of appellant's rights arose as the result of the actions of the Commissioner of Education.

The New York Court of Appeals, in its decision, pointed out that appellant had the option of seeking either a judicial review of the board's actions or a quasi-judicial review by the Commissioner of Education. Clearly, whichever review appellant sought, she was entitled to have a review conducted in accordance with the rules and regulations of the forum she chose.

Appellant chose to have her case reviewed by the Commissioner of Education. In doing so she accepted certain limitations on a subsequent review by the courts of the Commissioner's decision. That is the very point that the Court of Appeals emphasized in its decision. However in order to be held to that limitation, the Com-

missioner had an obligation of reviewing petitioner's appeal in accordance with the rules and regulations that had been established for such review. Section 275.12 of the Rules and Regulations of the Commissioner of Education provides:

> "The answer of each respondent shall contain a clear and concise statement of his defenses of each claim and shall neither admit or deny the allegations of the petition."

A reading of the answer submitted by the appellee board to the Commissioner fails to reveal any reasons set forth for its decision, thereby violating the Commissioner's own regulations. Yet the Commissioner did not ask the Board to submit the reasons.

Not only didn't the Commissioner require the board to give its reasons, but the Commissioner, in his decision, did not give reasons for sustaining the board. In both instances the due process requirement that reasons be given were violated (*Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011 [1969]).

A wrong was done to Mrs. Strongin by both the Board of Education and the Commissioner of Education in the failure to grant her fundamental rights of due process. A wrong once done cannot be embraced by the courts of this country even if such a wrong can ultimately be undone (*Fuentes v. Shevin*, 407 U.S. 67, 32 L. Ed. 2d 556 [1972]).

Clearly a wrong was done to Mrs.

Strongin and this wrong, which has resulted in her discharge, can only be undone if the determination is set aside.

CONCLUSION

Based on the foregoing, appellant respectfully submits that she has been denied the due process which this Court has held she was entitled to, and such denial of due process should prompt this Court to exercise its jurisdiction in this case.

Respectfully submitted,

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APPENDIX A — DECISION OF PANEL CONVENED PURSUANT TO EDUCATION LAW SECTION 3020-A

DECISION

Charge I — *Inefficiency and Incompetency*

Specification — 1. That between in or about the months of May, *1968,* January, *1969,* your actions in negligently reviewing the file of one Mildred Saunders prevented her graduation from the Mount Vernon High School in June, 1968.

Letter of February 7, 1969 respondent's Exhibit B clearly states that Mrs. Strongin's suspension was lifted without prejudice. "I do not believe that a mistake of this kind, the first of this nature in your long years of service warrants a formal hearing . . ."

The panel feels that Superintendent Franko's letter along with Mrs. Strongin's testimony that she had asked for the girl to be graduated, supported by Petitioner's Exhibit #15, exonerates her from being penalized for the same charges a second time. This matter had already been resolved.

Specification — 2. That you are incapable of relating to high school students concerning their personal problems in educational matters, and that you have exhibited indifferent and hostile attitudes towards such students which have resulted in numerous requests by students and parents for a change of guidance counselor. The names of some of the complainants are: Bettie Glover, Veronica Matthews, Walter Battie, Gayle Aronson, Ronald Manna, Irene Petinakis, Katherine Sheppared, Theresa Groupper and Jacquie Lomont.

The panel feels that the facts presented by the witnesses (students) were contrary to the opinions they expressed. The

testimony failed to prove that Mrs. Strongin was incapable of relating to high school students. Example: Students said they could not get to see Mrs. Strongin, yet they added they only saw her two or three times in a short period of time. Students stated that she would not listen to them, yet in almost every instance she effectuated either changes in schedules or indicated referrals. The general problem that exists between guidance counselor, students, and teachers is one of expectations and an interpretation of role. It is inherent in this kind of relationship that misunderstandings will occur, and in this case they have been magnified out of proportion.

> *Specification* — 3. That on or about October 5, 1972, you misinformed a substantial number of students assigned to you regarding the completion of the application for Regents, Scholarship and Qualification Test by instructing each of them to check a particular box on the form which would have precluded them from receiving a regents scholarship.

In reviewing the testimony we find that Mrs. Strongin was not informed that any complaint had been made in this regard until the charges were brought, Mrs. Strongin's supervisor, Mrs. Liebman, had never held a conference with Mrs. Strongin regarding the matter and offered no documentation to substantiate the charge.

The events upon which this charge is based occurred more than two years prior to the charges being made. This extended time lapse, without prior communication to Mrs. Strongin from her supervisor regarding this problem, makes it impossible for the panel to resolve the disparity in testimony. In the absence of formal or written communication, we find we cannot accept this charge as serious.

> Charge II — *Insubordination, Neglect of Duty, and Conduct Unbecoming a Teacher*

Appendix A

> *Specification* — 1. That on several occasions during the 1970/71 school year, you refused, without just cause to take students assigned to you for counseling.

The testimony of the Board's witnesses indicates at most that Mrs. Strongin protested the assignment of additional students but never that she refused to take them.

> *Specification* — 2. That on several occasions during school years 1971/72 and 1972/73, you spoke to students assigned to you in a loud and abusive manner, and have made such students unwelcome in your office, notwithstanding that you were admonished to cease and desist from such practice.

The panel did not discover conclusive evidence that Mrs. Strongin spoke in a loud and abusive manner and that she made students feel unwelcome. If in fact she had, the panel feels that it was incumbent upon her administrator to advise her and guide her towards more acceptable behavior. By their own testimony there were no conferences, no written evaluations and no concrete guidelines set down for Mrs. Strongin. There is no evidence that Mrs. Strongin was ever admonished to cease and desist from such practice. (Testimony pages 338 and 339 — Mrs. Liebman's testimony that there were no written evaluations of Mrs. Strongin's job performance from her or anybody else in a supervisory capacity.) (Testimony, pages 339, 340, 341, — Mrs. Liebman's testimony that she never individually communicated with Mrs. Strongin professionally or socially.)

> *Specification* — 3. During school years 1971/72 and 1972/73 you have discouraged students from pursuing their education in that you have made them feel that they do not have the ability to achieve their educational goals.

The panel cannot find any evidence to support this charge.

> *Specification* — 4. That on or about November 18, 1971, you were abusive, insulting and disrespectful to a fellow counselor one Sylvia Berger, when she attempted to discuss with you a counselee, one Walter Battle, who had been originally assigned to you and was later reassigned to Mrs. Berger.

The panel finds there is no evidence relating to this incident that can be construed as supporting the charge. It feels that the primary basis for any problems arising from this incident was a matter of personality conflict between Mrs. Strongin and Mrs. Berger.

> *Specification* — 5. That on or about November 4, 1971, in the presence of Mrs. Barbara A. Feiden, Director of Upward Bound, her Administrative Assistant and a student Walter Battle, you belittled the ability of said student and criticized him in a cold, sarcastic and insensitive manner.

This Specification indicates that Mrs. Strongin allegedly criticized Walter Battle in a cold, sarcastic and insensitive manner. Upon reviewing the testimony of Mrs. Feiden the Panel noted that this witness could not specifically recollect any words that would substantiate this charge. Pages 44-ff in the testimony give indication that it was a feeling rather than words that made her make this kind of unsubstantiated judgment. The only direct quote in Mrs. Feiden's testimony was "Walter was not qualified to take data processing because he did not have the necessary grade point average". This statement by Mrs. Strongin was never controverted by any testimony. Furthermore, Mrs. Feiden lacked the specific information regarding Walter Battle's program and programming needs for graduation or college.

> *Specification* — 6. That on several occasions during school year 1971/72, you neglected on several occasions to report to the head counselor's office although you

were requested to do so, and offered no valid excuse for not so doing.

Specification #6 refers to "several occasions during the school year"; however, testimony was only provided relating to a single incident and said testimony demonstrated that Mrs. Strongin did in fact report to the head counselor's office upon receipt of a formal request to do so.

> *Specification* — 7. That on several occasions during the school year 1971/72 you went outside normal channels in complaints to division and high school principals.

The panel finds that Mrs. Strongin did operate through normal channels. The one incident testified to in regard to this Specification indicates that Mrs. Strongin had spoken to Mrs. Hunt before going to the principal.

> *Specification* — 8. That on many occasions during the school years 1970/71 and 1971/72 you have been rude, arrogant and disrespectful towards other staff members and employees.

There is abolutely nothing in the record that substantiates this charge.

> *Specification* — 9. That your course of conduct has had a demoralizing effect on both staff members and students and has interfered with the orderly operation of the guidance program and department.

In reviewing the testimony the panel cannot find any evidence of claim by the school board that Mrs. Strongin has a demoralizing effect on staff members of students, or has interfered with the operation of the guidance program and department.

Appendix A

SUMMARY STATEMENT

The panel unanimously agrees that the charges against Mrs. Strongin were unsubstantiated by the evidence presented. Our determination is that Mrs. Strongin should be fully reinstated without prejudice.

ADDENDUM

The panel wishes to express its extreme concern regarding the underlying causes that resulted in the bringing of these charges. It feels that this deplorable set of circumstances was the direct result of improper supervision and direction in the administration of the guidance department and the school system.

/s/ Diane Gess
/s/ William G. Sweet
/s/ Fred Nauman

APPENDIX B — DETERMINATION OF BOARD OF EDUCATION

In The Matter Of Charges Filed Against JEANETTE P. STRONGIN,

A Tenured Teacher

MOUNT VERNON SCHOOL DISTRICT

DETERMINATION

Hearings having been duly held at the Education Center, Mount Vernon, New York, on the 15th, 21st and 27th days of December, 1972, before Frank S. McCullough, Jr., Esq., Hearing Officer, and Mrs. Diane Gess, Mr. Fred Nauman and Mr. William Sweet, Panel Members, pursuant to Section 3020 A of the Education Law of the State of New York to hear charges preferred against Mrs. Jeanette P. Strongin, a guidance counselor assigned to the Mount Vernon High School, by Dr. William C. Prattella, Superintendent of Schools, to determine the following charges:

CHARGE I — *Inefficiency and Incompetency*

Specification — 1. That between in or about the months of May, 1968, January, 1969, your actions in negligently reviewing the file of one Mildred Saunders prevented her graduation from the Mount Vernon High School in June, 1968.

2. That you are incapable of relating to high school students concerning their personal problems in educational matters, and that you have exhibited indifferent and hostile attitudes towards such students which have resulted in numerous requests by students and parents for a

change of guidance counselor. The names of some of the complainants are: Bettie Glover, Veronica Matthews, Walter Battle, Gayle Aronson, Ronald Manna, Irene Petinakis, Katherine Sheppared, Theresa Groupper and Jacquie Lomont.

3. That on or about October 5, 1972, you misinformed a substantial number of students assigned to you regarding the completion of the application for Regents Scholarship and Qualification Test by instructing each of them to check a particular box on one form which would have precluded them from receiving a regents scholarship.

CHARGE II — *Insubordination, Neglect of Duty, and Conduct Unbecoming a Teacher*

Specification — 1. That on several occasions during the 1970/71 school year, you refused, without just cause, to take students assigned to you for counseling.

2. That on several occasions during school years 1971/72 and 1972/73, you spoke to students assigned to you in a loud and abusive manner, and have made such students unwelcome in your office, notwithstanding that you were admonished to cease and desist from such practice.

3. During school years 1971/72 and 1972/73 you have discouraged students from pursuing their education in that you have made them feel that they do not have the ability to achieve their educational goals.

4. That on or about November 18, 1971, you were abusive, insulting and disrespectful to a fellow counselor one Sylvia Berger, when she attempted to discuss with you a counselee, one Walter Battle, who had been originally assigned to you and was later re-assigned to Mrs. Berger.

5. That on or about November 4, 1971, in the presence of Mrs. Barbara A. Feiden, Director of Upward Bound, her Administrative Assistant and a student Walter Battle, you belittled the ability of said student and criticized him in a cold, sarcastic and insensitive manner.

6. That on several occasions during school year 1971/72, you neglected on several occasions to report to the head counselor's office although you were requested to do so, and offered no valid excuse for not so doing.

7. That on several occasions during the school year 1971/72 you went outside normal channels in complaints to division and high school principals.

8. That on many occasions during school years 1970/71 and 1971/72 you have been rude, arrogant and disrespectful towards other staff members and employees.

9. That your course of conduct has had a demoralizing effect on both staff members and students and has interferred with the orderly operation of the guidance program and department; and

Appendix B

After reading the transcripts of the aforesaid hearings and the decision of the panel, a copy of which decision is annexed hereto, and due deliberation having been had thereon, it is hereby determined as follows:

1. That all of the charges and specifications preferred against Mrs. Jeanette Strongin are substantiated by a preponderance of the credible evidence adduced at the hearings.

In reaching this determination, this Board has considered not only the individual charges and specification but their cumulative nature and affect on the school system as well.

2. That her suspension without pay which became effective on November 6, 1972 is hereby affirmed, and the employment of said Jeanette P. Strongin is terminated, the penalty being dismissal.

3. That the determination herein has been duly made by a vote of a majority of the members of the Board of Education taken at a meeting duly held on the 27th day of March, 1973.

Dated: March 28th, 1973.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON, NEW YORK

BY: M. Joseph deMarinis
M. JOSEPH deMARINIS
President

APPENDIX C — DECISION OF COMMISSIONER OF EDUCATION

THE UNIVERSITY OF THE STATE OF NEW YORK
THE STATE EDUCATION DEPARTMENT BEFORE THE COMMISSIONER

IN THE MATTER

OF THE

Appeal of JEANETTE P. STRONGIN from action of the Board of Education of the City School District of the City of Mount Vernon and William C. Pratella, Superintendent of Schools, with regard to her dismissal as a tenured teacher.

Eugene M. Kaufman, Esq. . . . attorney for petitioner Stephen Perelson, Esq., of counsel

Joseph R. Zibelli, Esq. . . . attorney for respondent

Petitioner began employment as a teacher in the respondent district in 1953 and was granted tenure as a teacher. In 1958 she was appointed as a guidance counselor, served in that capacity through June 1965 and acquired tenure as a guidance counselor. Petitioner continued as guidance counselor in the respondent district at the junior high school and senior high school until November 6, 1972, when she was suspended without pay, charges having been brought against her and probably cause having been found for such charges on November 3, 1972. The charges included three counts of inefficiency and incompetency and nine counts of insubordination, neglect of duty and conduct unbecoming a teacher.

Pursuant to section 3020-a of the Education Law, a hearing was held on December 15, 1972. The hearing panel concluded that petitioner was not guilty of the charges brought against her

and recommended reinstatement. The respondent board of education on March 27, 1973, upon the receipt of the hearing panel's report, found that petitioner was guilty of all charges and affirmed her suspension without pay and terminated her employment. Petitioner appeals from that decision and seeks reinstatement as a guidance counselor in the respondent district.

The record indicates petitioner was charged with inefficiency and incompetency in that she negligently reviewed the file of a student, thereby preventing the student from graduating when she should have. The transcript of the hearing afforded to petitioner, which contains more than 500 pages, indicates without a doubt that petitioner was negligent in reviewing the file of the student and that because of her oversight that student was not allowed to graduate when she should have.

With regard to the charge that petitioner was incapable of relating to students and that she was indifferent and hostile towards them, several students testified at the hearing as to petitioner's unavailability and inability to communicate with them.

While the findings and recommendations of hearing panels convened pursuant to the provisions of Education Law section 3020-a are entitled to great weight, the final responsibility for determining whether the charges have been sustained and for fixing the penalty, if any, to be imposed rests with the board of education. Those determinations may not be set aside unless found to be arbitrary, capricious, contrary to law, or an abuse of discretion. Upon the record before me, I find no basis for setting aside the determinations of respondent in this case.

THE APPEAL IS DISMISSED.

Appendix C

IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, (SEAL) for and on behalf of the State Education Department, do hereunto set my hand and affix the seal of the State Education Department, at the City of Albany, this 28th day of November 1973.

s/ Ewald B. Nyquist
Commissioner of Education

APPENDIX D — DECISION OF APPELLATE DIVISION, THIRD DEPARTMENT

Supreme Court—Appellate Division
Third Judicial Department

November 10, 1976 29398

In the Matter of JEANETTE P. STRONGIN,

Appellant,

v.

EWALD B. NYQUIST, as Commissioner of Education of the State of New York, et al.,

Respondents.

Appeal from a judgment of the Supreme Court at Special Term, entered December 13, 1974 in Albany County, which dismissed petitioner's application, in a proceeding pursuant to CPLR article 78, to vacate and set aside the decision of respondents, Commissioner of Education and Board of Education, finding petitioner guilty of all of the charges and specifications against her, and terminating her services as a tenured teacher in the Mount Vernon School District.

Petitioner, a tenured teacher, had charges preferred against her and, after a hearing pursuant to section 3020-a of the Education Law, the hearing panel unanimously found petitioner not guilty. The Board of Education rejected the panel's findings, found the petitioner guilty and immediately discharged her. Petitioner filed an appeal with the Commissioner of Education who sustained the board's action. An article 78 proceeding was thereafter commenced against the Commissioner of Education and the Board of Education. The petition was dismissed in all respects and this appeal ensued.

Replying upon *Kinsella v. Board of Education* (378 F. Supp. 54) petitioner urges that section 3020-a of the Education Law was unconstitutional at the time of these proceedings due to the fact that it did not require that the school board's decision be based upon the record developed before the hearing panel and the fact that it did not require that the school board render a written decision setting forth its reasoning and factual basis for its decision. When the constitutionality of a State statute is in question, notification of the Attorney General is required (Education Law, §71; CPLR 1012, subd. [b]). It was not given here. We deem it immaterial, however, for we find it unnecessary to reach the constitutional issue since the record reveals that the board specifically stated in its determination that it arrived at its decision after deliberation upon the transcripts of the hearings. We are also of the view that the board sufficiently stated the reasons relied upon for the determination (*Goldberg v. Kelly,* 397 U.S. 254).

Petitioner claims a denial of due process in that the board had an alleged financial interest in the outcome of the proceeding and because the board ruled upon whether or not there was probable cause after the filing of charges. It has been held that a person with a substantial pecuniary interest in a dispute should not participate in its adjudication (*Ward v. Village of Monroeville,* 409 U.S. 57; *Tumey v. Ohio,* 273 U.S. 510). Considering that we are dealing with the pay of only one school counselor, we are of the opinion that the board did not have such a substantial pecuniary interest so as to disqualify it as a decision-maker under these circumstances. Since the record fails to disclose any evidence that the board members were actually biased against the petitioner, we also find no violation of petitioner's due process rights due to the combination of decision making and investigatory powers in the board (*Matter of Jerry v. Board of Educ. of City School Dist. of City of Syracuse,* 44 A D 2d 198, rearg. 50 A D 2d 149, mod. 35 N Y 2d 534; *Matter of Buffalo Teachers' Federation v. Helsby,* 35 A D 2d 318).

Appendix D

Having dealt with petitioner's due process arguments, we now reach petitioner's contention that the board's findings are not supported by substantial evidence. Two charges were filed against petitioner. The first charge alleged inefficiency and incompetency and consisted of three specifications. Based on the record we find substantial evidence to support the board's findings as to each of the specifications and, therefore, the board's determination as to this charge is sustained. The second charge brought against petitioner alleges insubordination, neglect of duty, and conduct unbecoming a teacher and consists of nine specifications. A review of the record reveals substantial evidence to support only the allegations contained in specifications 3, 4 and 5. A finding that petitioner committed the minor transgressions alleged in these specifications wholly fails to support the board's determination that petitioner was guilty of the second charge.

While section 310 of the Education Law provides that a decision of the Commissioner shall be final and conclusive and not subject to question or review in any place or court, it does not preclude the court from reviewing a decision which is purely arbitrary or irregular (*Matter of Vetere v. Allen,* 15 N Y 2d 259). In view of our conclusion that charge II is not supported by the record, the Commissioner's action as to that charge is arbitrary since it is "without foundation of fact". The penalty imposed by the board, therefore, must be reassessed. Based on the record as a whole we believe that dismissal of the petitioner would be unjustified and an appropriate penalty would be a suspension of six months without pay (see *Matter of Bott v. Board of Education, Deposit Cent. School Dist.,* 51 A D 2d 81).

We have carefully considered petitioner's remaining arguments and find them to be unpersuasive.

Appendix D

Judgment modified, on the law and the facts by annulling so much of the determination as found petitioner guilty of charge II and by reducing the penalty to a suspension of six months without pay, and, as so modified, affirmed, without costs.

KOREMAN, P.J., SWEENEY, KANE, MAHONEY and LARKIN, JJ., concur

APPENDIX E — DECISION OF THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATE OF NEW YORK
COURT OF APPEALS

No. 224

In the Matter of Jeanette P. Strongin,

Respondent,

vs.

Ewald B. Nyquist, Commissioner of Education &c. and Board of Education of the School District of the City of Mount Vernon, et al.,

Appellants.

(224) Louis H.J. Welch & Robert D. Stone, Albany, for appellant State Education Commissioner.

Joseph R. Zibelli, Mt. Vernon, for appellants Mt. Vernon Board & Commissioner.

Eugene M. Kaufman, NY City, for respondent.

MEMORANDUM

This memorandum is uncorrected and subject to revision before publication in the New York Reports.

MEMORANDUM:

The order of the Appellate Division should be reversed, without costs, and the judgment of Special Term reinstated,

without prejudice to an application by petitioner for back pay for the period of suspension to the time of discharge (see *Matter of Bott v. Board of Educ.*, 41 NY2d 265, 269; *Matter of Meliti v. Nyquist*, 41 NY2d 183, 187-188; *Matter of Jerry v. Board of Educ.*, 35 NY2d 534, 543).

Petitioner, a tenured guidance counselor of the School District of the City of Mount Vernon, was charged with (1) "Inefficiency and Incompetency" and (2) "Insubordination, Neglect of Duty and Conduct Unbecoming a Teacher" and was suspended on November 3, 1972, pursuant to subdivision 2 of section 3020-a of the Education Law, without pay pending a hearing on the charges and the final determination thereof (see L 1970, ch 717, eff July 1, 1970, as amended by L 1971, ch 703, eff July 1, 1971, and L 1973, ch 772, eff Sept. 1, 1973). There were three specifications in support of the first charge and nine as to the second. Following a lengthy hearing pursuant to said section, a hearing panel unanimously found that the charges against petitioner were unsubstantiated by the evidence presented, but the Board of Education thereafter determined that all of the charges and specifications were established by a preponderance of the credible evidence and discharged her.[1] On November 28, 1973, the Commissioner of Education, upon an appeal to him, found no basis on which to set aside the board's determination.

Petitioner then commenced this article 78 proceeding to annul the decision of the commissioner and the actions of the Board of Education. Special Term viewed the board's determination as properly supported and dismissed the petition. The Appellate Division, however, found substantial evidence

1. By virtue of section 4 of chapter 82 of the Laws of 1977, effective April 15, 1977, several amendments to section 3020-a of the Education Law were enacted. Under subdivisions 4 and 5, as amended therein, the effect of the findings and recommendations of the hearing panel was altered materially.

only as to the specifications of the first charge and as to specifications 3, 4 and 5 of the second charge and held that a finding of guilt as to those three specifications failed to support the board's determination of guilt of the second charge. It modified the judgment so as to annul so much of the determination which found petitioner guilty of the second charge, reduced the penalty to a suspension of six months without pay, and remitted the matter to Special Term for a determination of the amount to be paid to petitioner in back salary, from the date of suspension to the date of reinstatement.

Petitioner was entitled to review the determination of the board either by appeal to the Commissioner of Education under article 7 of the Education Law or by a special proceeding under CPLR article 78 (Education Law, §3020-a, subd 5). Instead of resorting to the courts in the first instance, petitioner chose to appeal to the commissioner, as she had a right to do, and having made that choice it is the commissioner's decision upon that appeal that is to be reviewed here (*Matter of Chapin v. Board of Education of City of Buffalo,* 291 NY 241, 244, 245; *Anken v. Board of Educ.,* 42 AD2d 1031, 1032; *Matter of Ross v. Wilson,* 284 App Div 522, 526, see *Matter of Bokhair v. Board of Educ.,* 43 NY2d 855).

By virtue of the amendment of section 310 of the Education Law in 1976 (L 1976, ch 857; see Governor's Memorandum of Approval), the test to be applied on this appeal is whether the commissioner's determination, in supporting the board of education and in dismissing petitioner's appeal to him, was arbitrary and capricious (*Matter of Chauvel v. Nyquist,* 43 NY2d 48, 52). In view of the evidence supporting both charges and the serious nature of them, it cannot be said that the commissioner's action was without rational basis and, therefore, it must be upheld (*Matter of Pell v. Board of Educ.,* 34 NY2d 222, 230-231).

* * * * *

Appendix F

Order reversed, without costs, and the judgment of Supreme Court, Albany County, reinstated without prejudice to an application by petitioner for back pay in accordance with the memorandum herein. All concur.

Decided June 15, 1978

APPENDIX F — DENIAL OF MOTION FOR REARGUMENT BY COURT OF APPEALS

Mo. No. 765

In the Matter of the Application of Jeanette B. Strongin,

Respondent,

vs.

Ewald B. Nyquist, Commissioner of Education &c. and Board of Education of the School District of the City of Mount Vernon, et al.,

Appellants.

Motion for reargument denied

Decision Court of Appeals September 14, 1978

Supreme Court, U. S.
FILED
JAN 31 1979
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-1024

JEANETTE P. STRONGIN,

Appellant,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

SUPPLEMENT

STATEMENT AS TO JURISDICTION

EUGENE M. KAUFMAN
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In The

SUPREME COURT OF THE UNITED STATES

78-Term

No. 78-1024

JEANETTE P. STRONGIN,

Appellant,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

SUPPLEMENT TO JURISDICTIONAL STATEMENT

On or about December 12, 1978, petitioner filed with the Clerk of the Court a statement inadvertently titled "Appeal from the Court of Appeals of the State of New York". Inasmuch as no Notice of Appeal was filed with the Court of Appeals of the State of New York, the statement filed with this Court should have been titled "Petition

for a Writ of Certiorari to the United States Supreme Court".

This Court has jurisdiction pursuant to the provision of 28 USCS Section 1257(3), which provides as follows:

> "§1257. State Courts; appeal; certiorari
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * * * *
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

This Court, pursuant to the provisions of 28 USCS Section 2103, has the

jurisdiction to treat the original statement as a petition for a writ of certiorari where, as in the instant instance, the statement to the Court was improvidently referred to as an appeal.

CONCLUSION

Based upon the foregoing, appellant respectfully requests that pursuant to the provisions of 28 USCS Section 2103, this Court treat petitioner's original papers as a petition for a writ of certiorari to the United States Supreme Court. In addition, based upon the facts and law as set forth in appellant's original statement, and pursuant to the provision of 28 USCS Section 1257(3), this Court grant appel-

lant's petition for a writ of certiorari.

Respectfully submitted,

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78-1024

Supreme Court, U. S.
FILED
JAN 23 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1024

JEANNETTE P. STRONGIN,

Appellant,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York, and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

Appeal from the Court of Appeals of the State of New York

MOTION TO DISMISS

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In The

SUPREME COURT OF THE UNITED STATES

78-Term

No.

JEANETTE P. STRONGIN,

Appellant,

-against-

EWALD B. NYQUIST, Commissioner of Education of the State of New York and BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON,

Appellees.

STATEMENT AS TO JURISDICTION

This case involves an appeal from an administrative decision of the Appellee, EWALD B. NYQUIST, affirming an administrative decision of the Appellee, BOARD OF EDUCATION OF THE

SCHOOL DISTRICT OF THE CITY OF MOUNT VERNON.

Constitutional questions were raised for the first time on appeal from the decision of the Appellee, NYQUIST, to the Supreme Court of the State of New York. They were not raised at the earliest opportunity nor in accordance with Section 1012(b) of the New York State Civil Practice Law and Rules and Section 71 of the Executive Law.

Appellant claims a denial of due process in that the statute providing for the initial hearing did not require a transcript or findings. In fact, a transcript of the hearing was made and findings were issued by both the Appellee BOARD OF EDUCATION, and the Appellee, NYQUIST.

Appellant also claimed a pecuniary interest on the part of the Appellee BOARD OF EDUCATION although she demonstrated no evidence of same nor is any

conflict of interest shown.

There is no substantial federal question.

STATUTES INVOLVED

New York State Education Law Section 3020-a provides as follows:

§3020-a. Hearing procedures and penalties

1. Filing of charges. Except in cities having a population of one million or more, all charges against a person enjoying the benefits of tenure as provided in subdivision three of section one thousand one hundred two, and sections two thousand five hundred nine, two thousand five hundred seventy-three, three thousand twelve, three thousand thirteen and three thousand fourteen of this law shall be in writing and filed with the clerk of the school district or employing board during the period between the actual opening and closing of the school year for which the employee is normally required to serve. Except as provided in subdivision eight of section two thousand five hundred seventy-three of this law, no charges under this section shall be brought more than five years after the occurrence of the alleged incompetency or misconduct, except when the charge is of misconduct constituting a crime when committed.

2. Disposition of charges. Upon receipt of the charges, the clerk of the school district or employing board shall immediately notify said board thereof. Within five days after receipt of charges, the employing board, in executive session, shall determine, by a vote of a majority of all the members of such board, whether probable cause exists. If such determination is affirmative, a written statement specifying the charges in detail, and outlining his rights under this section, shall be immediately forwarded to the accused employee by certified mail. The employee may be suspended pending a hearing on the charges and the final determination thereof. Within five days of receipt of the statement of charges, the employee shall notify the clerk of the employing board whether he desires a hearing on the charges. Unless the employee has waived his right to a hearing within the allotted time, the clerk of the board shall, not later than the end of said five-day period, notify the commissioner of education of the need for a hearing. If the employee waives his right to a hearing the employing board shall proceed, within five days, by

a vote of a majority of all the members of such board, to determine the case and fix the penalty or punishment, if any, to be imposed in accordance with subdivision four of this section.

3. Hearings.

a. Notice of hearing. Upon receipt of a request for a hearing in accordance with subdivision two of this section, the commissioner of education shall schedule a hearing, to be held in the local school district, or county seat, within fifteen days of his receipt of the request therefor, and immediately notify the employee and the employing board of the time and place thereof and the procedures to be followed in selecting a hearing panel.

b. Hearing panel members. For the purposes of this section the commissioner of education shall maintain a list of hearing panel members, composed of professional personnel without administrative or supervisory responsibility, professional personnel with administrative or supervisory responsibility, chief school administrators, members of employing boards and others, selected from lists of nominees submitted by statewide organizations representing teachers, school administrators and supervisors and the employing boards. Hearing panel members shall be compensated at the rate of fifty dollars for each day of actual service plus necessary travel and subsistence expenses incurred in carrying out the duties of a panel member.

c. Hearing procedures. The commissioner of education shall have the power to establish necessary rules and procedures for the conduct of hearings under this section. Such rules shall not require compliance with technical rules of evidence. All such hearings shall be held before a hearing panel composed of three members not resident, nor employed, in the territory under the jurisdiction of the employing board, selected in the following manner from the list maintained by the commissioner of education for such purpose: one member shall be selected by the employee, one member shall be selected by the employing board and the third member shall be chosen by the mutual agreement of the first two, or, if they fail to agree, by the commissioner of education.

Each such hearing shall be conducted by a hearing officer designated by the commissioner of education and shall be public

or private at the discretion of the employee. The employee shall have a reasonable opportunity to defend himself and an opportunity to testify in his own behalf. Each party shall have the right to be represented by counsel, to subpoena witnesses, and to cross-examine witnesses. All testimony taken shall be under oath which the hearing officer in charge is hereby authorized to administer. A competent stenographer, designated by the commissioner of education, shall keep and transcribe a record of the proceedings at each such hearing. A copy of the transcript of the hearing shall, upon request, be furnished without charge to the employee involved.

4. Post hearing procedures. Within five days of the conclusion of a hearing held under this section, the commissioner of education shall forward a report of the hearing, including the findings and recommendations of the hearing panel and their recommendations as to penalty if one is warranted, to the employee and to the clerk of the employing board. Within five days of receipt of such hearing report the employing board shall determine the case by a vote of a majority of all the members of such board and fix the penalty or punishment, if any, which shall consist of a reprimand, a fine, suspension for a fixed time without pay or dismissal. If the employee is acquitted he shall be restored to his position with full pay for any period of suspension and the charges expunged from his record.

5. Appeal. Any employee feeling himself aggrieved may review the determination of the employing board either by appeal to the commissioner of education as provided for by article seven of this chapter, or by a special proceeding under article seventy-eight of the civil practice law and rules. If the employee elects to institute such proceeding, the determination of the employing board shall be deemed to be final for the purpose of such proceeding.

The New York State Civil Practice Law and Rules, insofar as applicable to this matter, provides as follows:

"§1012. Intervention as of right; notice to attorney-general where constitutionality in issue.

(b) Notice to attorney-general where contitutionality in issue. When the constitutionality of a statute of the state

is not a party, the court shall notify the attorney-general, who shall be permitted to intervene in support of its constitutionality."

Section 71 of the executive law of the State of New York is as follows:

§71. Attorney-general to appear in cases involving the constistitutionality of an act of the legislature.

Whenever the constitutionality of a statute is brought into question upon the trial or hearing of any action or proceeding, civil or criminal, in any court of record of original or appellate jurisdiction, the court or justice before whom such action or proceeding is pending, may make an order, directing the party desiring to raise such question, to serve notice thereof on the attorney-general and that the attorney-general be permitted to appear at any such trial or hearing in support of the constitutionality of such statute. The court or justice before whom any such action or proceeding is pending may also make such order upon the application of any party thereto, and the court shall make such order in any such action or proceeding upon motion of the attorney-general. When such order has been made in any manner herein mentioned it shall be the duty of the attorney-general to appear in such action or proceeding in support of the constitutionality of such statute.

QUESTIONS PRESENTED

1. Where a party in an administra- proceeding chooses to appeal the first administrative decision to a second administrative body, and then appeals to the courts, do the courts consider this as an appeal from the first or second administrative determination?

2. What is the standard of review by the courts of an administrative determination?

3. Can the Appellant challenge the constitutionality of State laws without having drawn in question the federal issues at the earliest opportunity?

4. Can the Appellant challenge the constitutionality of State laws without following the statutory requirements of the State for doing so?

5. If a State law has been held to not contain requirements that would constitute due process, but the Appellant received all of those requirements, is there still a violation of due process?

6. If the decision-making agency has no financial interest in the decision, and there is no evidence of a conflict of interest, can the agency be determined to be partial?

7. Is there a sustantial federal question involved?

STATEMENT OF THE CASE

The Appellant, a tenured school teacher, was charged by William A. Prattella, the full-time, salaried superintendent of schools for the City of Mount Vernon, with the charges and specifications set forth on pages 38 - 40 of the Appellant's Brief.

A three-member panel held a hearing under Section 3020-a of the Education Law of the State of New York. A stenographer was in attendance and a transcript exceeding 500 pages was made of the hearing. The panel recommended dismissal of the charges.

Under section 3020-a the initial decision was made by the nine-member Board of Education. These nine members are part-time, non-salaried and elected. Prattella was appointed by the Board. The Board read the transcript, made a

finding, imposed a penalty and issued a written decision. See p.41 of Appellant's Brief.

The Appellant then chose to appeal this matter to the Appellee NYQUIST, although the Appellant had the right to appeal directly to the Supreme Court of the State of New York, Section 3020-a(5). The Appellee,NYQUIST, reviewed the transcript, heard argument by both counsel, found against the Appellant and issued a written decision affirming the Appellee BOARD OF EDUCATION. See pgs. 42 and 43 of Appellant's Brief.

Appellant then appealed NYQUIST's decision to the New York State Supreme Court and for the first time raised constitutional questions. Appellant never moved the Court to bring in the Attorney General of the State of New York as required by Section 71 of the Executive

Law and Section 1012(b) of the Civil Practice Law and Rules. The Supreme Court dismissed the petition of Appellant.

Thereafter, the Appellate Division modified the decision of the Appellee NYQUIST, but the Court of Appeals reversed the Appellate Division and reinstated the decision of the Supreme Court, the Appellee NYQUIST and the Appellee BOARD OF EDUCATION.

ARGUMENT

Point I

THE NEW YORK STATE COURTS IN THIS CASE REVIEWED THE DECISION OF THE APPELLEE NYQUIST AND NOT THE DECISION OF THE APPELLEE BOARD OF EDUCATION.

When a teacher appeals a decision of a Board of Education to the Commissioner of Education, and thereafter appeals the commissioner's decision to the State Courts, the Courts can review only the commissioner's decision and not that of the local board of education. Matter of Chapin v Board of Education, 291 NY 241. See also Chauvel v Nyquist, 43 NY2d 48.

After the Mount Vernon Board of Education decided against the Appellant, the Appellant had a right to go the the State courts to review the decision of the Board of Education. Section 3020-a(5) of the Education Law of the State of New York. Appellant chose not to exercise this right but to follow the alternate remedy of

appealing to the Commissioner of Education. When the Commissioner found against Appellant, and Appellant then appealed to the State courts, the matter under review by the State courts was the decision of the Appellee NYQUIST and not of the Appellee BOARD OF EDUCATION.

Point II

THE NEW YORK STATE COURTS COULD REVERSE THE DECISION OF THE APPELLEE NYQUIST ONLY IF THE APPELLEE NYQUIST WAS ARBITRARY AND CAPRICIOUS AND MADE A DETERMINATION WHICH HAD NO RATIONAL BASIS

The standard of review by the New York courts of an administrative decision is set forth in Chauvel v Nyquist, supra. The Court stated:

> "Accordingly, the inquiry on this appeal is whether the commissioner's determination supporting the Board of Education and dismissing appellant's appeal was arbitrary and capricious, i.e., whether there was no rational basis for such decision." (At p52)

See also Pell v Board of Education, 34 NY2d 222,and Chapin v Board of Education, supra, where the Court said that the commissioner's decision was final unless shown to be purely arbitrary.

The Appellee NYQUIST read the transcript of the hearing which contains more than 500 pages and listened to the arguments of the attorneys for the Appellant and Appellee, BOARD OF EDUCATION. Appellee NYQUIST issued a two-page decision indicating that the Appellant was negligent "without a doubt", stated that there was testimony regarding her lack of capability and her indifference and hostility towards students. The Court of Appeals of New York State held that the Commissioner's decision was not arbitrary. Accordingly, that decision should stand.

Point III

APPELLANT DID NOT RAISE THE CONSTITUTIONAL QUESTIONS AT THE EARLIEST OPPORTUNITY

It has been held for many years that federal questions must be raised at the lowest level in order for the Supreme Court of the United States to review them, Hulbert v Chicago,202 U.S. 275. When the validity of statutes is in issue, that validity must have been "drawn in question" and the issue must be "specially set up or claimed". Parker v Illinois, 333 U.S. 571, Pennsylvania R. Co. v Illinois Brick Co., 297 U.S. 447, Central Union Co. v Edwardsville, 269 U.S. 190.

The proper procedure to challange Section 3020(a) of the Education Law was followed in Kinsella v the Board of Education, 378 F.Supp. 54, affd. 542 F.2d 1165 (2d Circ. 1976).

The Kinsella case will be discussed in Point V of this Brief with regard to the substance of issues.

Kinsella, a tenured school teacher, had charges brought against him and was scheduled for a hearing under Section 3020-a. Kinsella brought a proceeding in Federal Court against the Board of Education challenging the constitutionality of Section 3020-a on numerous grounds. The federal and constitutional questions were, therefore, specifically set up at the earliest opportunity. Kinsella did not do what the Appellant herein did. The Appellant herein had her hearing without objection, appealed to the Commission of Education and had arguments made before the Commissioner. Only after losing before both administrative agencies did the Appellant herein

raise the constitutional questions. Appellant, therefore, proceeded under Section 3020-a for two stages hoping to win, and only if she lost was she going to question the validity of the statute. The appeal should be dismissed.

Point IV

APPELLANT DID NOT FOLLOW NEW YORK STATE REQUIREMENTS FOR CHALLENGING THE CONSTITUTIONALITY OF A NEW YORK STATE STATUTE

Where a party challenges the constitutionality of a New York State statute, the party should make a motion before a court to give notice to the Attorney General of the State of New York so that the Attorney General may come into the case with regard to the issue of constitutionality, Section 71 of the Executive Law of the State of New York and Section 1012(b) of the Civil Practice Law and Rules of the State of New York.

Appellant failed to follow New York State statutary procedure for challenging the constitutionality of a New York State statute. The Attorney General of the State of New York was given no opportunity to intervene in the case. Accordingly,

the appeal should be dismissed.

Point V

A STENOGRAPHER WAS PRESENT AT THE APPELLANT'S HEARING. A TRANSCRIPT OF OVER 500 PAGES WAS MADE OF THE HEARING. THE APPELLEE BOARD OF EDUCATION AND THE APPELLEE NYQUIST BOTH ISSUED WRITTEN DECISIONS. ACCORDINGLY, THE DEFECTS IN SECTION 3020-a WERE NOT APPLICABLE TO THE APPELLANT.

The main thrust of the Appellant's case is that the Appellant had a hearing under a supposedly unconstitutional statute. In fact, the statute was not held to be entirely unconstitutional. The Federal District Court for the Western District of New York did find that Section 3020-a contained defects in that neither the statute nor the regulations required a transcript of the hearing or written decisions of the deciders of fact, Kinsella v Board of Education, supra.

In the Kinsella case, the plaintiff challenged Section 3020-a on a whole

variety of grounds but was sustained on only the issues of the transcript and written decision. The Court stated:

> "The statute does not require that the school boards'decision be based upon the record developed before the hearing panel. Indeed, there is no requirement that a transcript of the hearing panel proceedings even be sent to the school board, although it has been represented at oral argument that the school board may, if it so desire, order the transcript" (At pgs. 59-60)

The Court went on to note on page 60 of the decision that a written decision was not required by the decider of facts. Accordingly, the Court stated that either legislative action or executive action with regard to rules and regulations was required to cure the two statutory defects.

In the instant case, the defects were not applicable. Although neither the statute or the regulations required a transcript, a transcript was in fact made and sent to the school board which read it. That same transcript was read by the Commissioner of Education's office. Although neither Section 3020-a nor the Rules and Regulations required written decisions, in fact both the school board and Appellee NYQUIST rendered written decisions.

It is absolutely clear that in no way was the Appellant prejudiced. In fact, the claim that the statute was unconstitutional as it applies to Appellant when in fact the Appellant received complete due process is a sham argument. For this Court to reverse would mean that Appellant was to have a new hearing with another transcript and written decisions again issued. Nothing

would be different except that testimony might be altered depending upon the availability of witnesses.

What would happen to all other hearings under that section of law where transcripts were in fact made and written decisions were issued?

Would all of these hearings have to take place again? All that a reversal would accomplish is to give those who are charged a second opportunity to present their case after having lost the first time with due process of law having already been accorded them.

It should be remembered that the appeal to the courts was only an appeal from the decision of the Appellee NYQUIST who had reviewed a transcript of over 500 pages, rendered a decision in writing, and in no way acted in a procedural manner denying due process

to the Appellant. Neither, in fact, did the Board of Education.

Point VI

THERE WAS NO PECUNIARY INTEREST INVOLVED IN THE OUTCOME OF THIS INTEREST BY ANY APPELLEE

The charges against the Appellant were made by a salaried employee of the Appellee BOARD OF EDUCATION. The initial determination was made by nine non-salaried,part-time,elected officials of the local board of education. The second determination was made by a full-time salaried employee of the State of New York. It is exceedingly difficult to ascertain how any of the officials making decisions had a pecuniary interest in the outcome. In no way is this case similar to Tumey v Ohio, 273 U.S. 510, in which the local Judge was paid out of the fines collected on convictions. The case herein does not even approach the fact situation of Ward v Village of Monroeville, 409 U.S. 57. In the Ward

case, the local mayor was also the traffic Judge. Over a four-year period, the fines imposed constituted between 37 per cent and 50 per cent of the entire Village income. The test enunciated in the Ward case should be applied to the situation herein:

> "...whether a situation... would offer a possible temptation to the average man as a judge to forget the burden of proof required..." (At p60.)

The court held in Ward that the mere union of executive power and judicial power is not a violation of due process. The local board of education has legislative power and judicial power but no executive power. There is nothing set forth in the Appellant's Brief to show the pecuniary interest of a board of education in firing a teacher, particularly when they are non-salaried and elected.

Even if, as is not shown herein, a member of the board of education had some prior involvement in the case herein, there would be no violation of due process, Goldberg v Kelly, 397 U.S. 254. See also Richardson v Perales, 402 U.S. 389 and Marcello v Bonds, 349 U.S. 302.

Considering that this case is really an appeal from the decision of Appellee NYQUIST, the question of pecuniary interest or conflict of interest is even more farfetched. In fact the Appellant's argument so strains the facts that she might as well argue that no federal judge could sit on a case involving the United States.

Point VII

THERE IS NO SUBSTANTIAL FEDERAL QUESTION INVOLVED HEREIN

Before the Supreme Court of the United States will take an appeal, there must be a substantial federal question, Zucht v King, 260 U.S. 174, Sugarman v United States, 249 U.S. 182, Jacobson v Massachusetts, 197 U.S. 11. The questions involved herein are devoid of merit and in fact are frivolous.

The issue really involved is whether an Appellant who received complete due process in fact is entitled to a second hearing because the statute did not require all of the procedural safe-guards which were in fact accorded to the Appellant. It should be noted that while the Appellant claims that she was tried under an unconstitutional statute, she in no way sets forth what

rights she should have received that she didn't.

With regard to the impartiality of the hearing,there is also a total lack of evidence showing a pecuniary interest or conflict of interest. To upset the decision herein on constitutional grounds would be to render all departmental hearings void, including a hearing by a State Commissioner with regard to a municipal employee.

CONCLUSION

The Appellant has in no way been denied due process of law and the appeal should be dismissed.

Respectfully submitted,

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